INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	4
Argument	8
Conclusion	13

CITATIONS

Cases:

Robertson v. *Bradbury*, 132 U.S. 491	9
John A. Steer & Co. v. *United States*, 30 Cust. Ct. 504	13
United States v. *Heffernan Paper Co.*, 13 Ct. Cust. App. 593	8, 10, 12
United States v. *M. Minkus*, 21 CCPA (Customs) 382	13
United States v. *Passavant*, 169 U.S. 16	13
United States v. *Traders Paper Co.*, 14 Ct. Cust. App. 293	8, 10
United States v. *Zellerbach Paper Co.*, 28 CCPA (Customs) 303	9, 10, 13

Statutes:

Act of March 3, 1883, 22 Stat. 488	9
Revised Statutes of the United States, Sections 2907-2908	9
Tariff Act of 1922, Section 402(b), 42 Stat. 949	10
Tariff Act of 1930, 46 Stat. 590, as amended, 52 Stat. 1077, 19 U.S.C. 1001, *et seq.*:	
Section 402(a)	2
Section 402(c)	3, 4, 10
Section 402(d)	3, 4, 10, 11
Section 501	5
28 U.S.C. 1256	10
28 U.S.C. 2637	10

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 139

PAUL A. STRAUB & CO., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Customs Court (R. 9-15) is reported at 27 Cust. Ct. 442; the opinion of the Appellate Term, First Division, of the Customs Court (R. 18-23) is reported at 30 Cust. Ct. 619; the opinion of the Court of Customs and Patent Appeals (R. 25-33) is reported at 89 Treas. Dec., Advance Sheet No. 14, p. 47.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on February 3, 1954

(R. 34). A petition for rehearing (R. 35-42) was denied on March 23, 1954 (R. 52). The petition for a writ of certiorari was filed on June 15, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Whether an importer of merchandise sold exclusively f.o.b. port of the country of origin—no sales being made on an at-the-factory or principal-market-place basis—is entitled to have deducted an amount equivalent to the normal freight charges between factory and port in the computation of the export value as defined in Section 402(d) of the Tariff Act of 1930.

STATUTE INVOLVED

Section 402 of the Tariff Act of 1930, 46 Stat. 590, 708, as amended by the Act of June 25, 1938, 52 Stat. 1081, 19 U.S.C. 1402, provides in pertinent part:

> Section 402. Value.
>
> (a) Basis.—For the purposes of this Act the value of imported merchandise shall be—
>
> (1) The foreign value or the export value, whichever is higher;
>
> (2) If the appraiser determines that neither the foreign value nor the export value can be satisfactorily ascertained, then the United States value;

(3) If the appraiser determines that neither the foreign value, the export value, nor the United States value can be satisfactorily ascertained, then the cost of production;

* * * * *

(c) Foreign value.

The foreign value of imported merchandise shall be the market value or the price at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale for home consumption to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, including the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

(d) Export value.

The export value of imported merchandise shall be the market value or the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course

of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

* * * * *

STATEMENT

During the year 1947, petitioner imported certain china ornaments into the United States from Germany, which were appraised by the customs appraiser for duty purposes on the basis of their export value as defined in Section 402(d) of the Tariff Act of 1930, *supra,* pp. 3-4 (R. 7). The principal market in Germany for such or similar merchandise was the factory at Selb-Stadt, where it was sold to all purchasers in the usual wholesale quantities and in the ordinary course of trade for export to the United States at various unit prices f.o.b. Bremen.[1] No sales of merchandise of that character were ever made on an at-the-factory basis. (R. 8).

In entering the merchandise for customs duty purposes, petitioner deducted from the value as

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[1] Such or similar china ornaments were not sold in Germany for home consumption. It was stipulated that there was no foreign value, as defined in Section 402(c) of the Tariff Act of 1930, *supra*, p. 3, for the merchandise, and that the proper basis for appraisement was the export value, as defined in Section 402(d) of that Act, *supra*, pp. 3-4.

shown on the invoice papers an amount equal to the normal freight charges between the factory at Selb-Stadt and the port of Bremen (R. 7). Subsequently, the customs appraiser, when appraising the merchandise, declined to deduct from the unit prices shown on the invoice papers any amount for freight, but instead, appraised the merchandise for duty purposes at the unit prices shown on those papers.[2] (R. 7). Petitioner thereupon filed an appeal for reappraisement in the United States Customs Court under Section 501 of the Tariff Act of 1930, as amended, (46 Stat. 590, 730, 52 Stat. 1084, 19 U.S.C. 1501, 28 U.S.C. 2631), contending that an amount equal to the normal freight charges between the factory at Selb-Stadt and Bremen should be deducted from the unit prices shown on the invoice papers in order to establish the statutory export value of the imported merchandise (R. 5). The case was submitted to the Customs Court (a single judge, sitting in reappraisement) on a stipulation of facts, the pertinent parts of which read as follows (R. 9):

> (1) That on or about the time of exportation herein such or similar merchandise was freely offered for sale to all purchasers in Selb-Stadt, Germany, in the usual wholesale

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[2] Since the freight was included in the unit prices of the merchandise, the invoice papers contained no separate item or items covering it and there was nothing to indicate that there were separate unit prices for the goods and separate unit freight charges (R. 28).

quantities and in the ordinary course of trade for exportation to the United States including the cost of all containers and coverings of whatever nature, and all other costs, charges and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, at the f.o.b. Bremen prices appearing upon the invoice, which included an item of "RM 91.80 costs for freight Selb-Stadt f.o.b. Bremen".

* * * * *

(7) That on or about the time of exportation herein, the factory at Selb-Stadt was the principal market in Germany for such or similar merchandise.

(8) That on or about the time of exportation herein, all sales and offers for sale of such or similar merchandise were made at Selb-Stadt, Germany, on an f.o.b. Bremen basis and no sales or offers for sale were made on an at factory basis.

* * * * *

The single judge sustained petitioner's appeal to reappraisement on the ground that the amount deducted upon entry as a freight item was not part of the price of the goods, but was a charge which had arisen after the goods had left the principal market, and for that reason was not includible in the value of the merchandise for duty purposes (R. 9-15).

On the Government's appeal to the appellate division of the Customs Court, that division, after treating as distinguishable several prior decisions of the Court of Customs and Patent Appeals which had denied deductions for inland freight in instances where sales had been made f.o.b. destination, affirmed the decision of the single judge. The appellate division concluded that in the instant case "delivery f.o.b. Bremen was not a condition of the offer of the merchandise, but was a matter of convenience of the parties and had no other significance," and that the freight was not a part of the purchase price because "such an offer [to sell] was the equivalent of an offer at the factory, plus the freight and f.o.b. costs." (R. 22.)

The Court of Customs and Patent Appeals reversed the decision of the appellate division (R. 33, 34). After disagreeing sharply with the Customs Court that its prior decisions holding that inland freight may not be deducted from the unit prices of sales made f.o.b. destination were distinguishable from the case at bar (R. 29-33), that court held that there was no substantial evidence in the record to warrant the finding that the inland freight was a non-dutiable item in computing the statutory export value of the merchandise. In so holding, it characterized the Customs Court's conclusions that "delivery f.o.b. Bremen was not a condition of the offer of the merchandise, but was a matter of convenience of the parties and had no other significance", and that "such an offer was the equivalent of an offer at the factory, plus

the freight and f.o.b. costs," as an attempt to distinguish the form of the offer to sell from its substance, which ignored the established and undisputed fact that "there was but one price to all purchasers in the principal market and that price included inland freight, not just in some transactions, but in each and every sale or offer for sale." (R. 29-30.)

ARGUMENT

1. Petitioner's principal contention seems to be (Pet. pp. 4-6) that the decision of the court below is a departure from the long-established doctrine of customs law that inland freight from the principal market of the exporting country to the port of embarkation is not considered a part of the dutiable value of imported merchandise. The contention is plainly erroneous. The court below did not ignore or impugn the established doctrine governing the treatment of inland freight in computing the statutory foreign or export value of imported merchandise. It simply applied one of the exceptions to that doctrine which it has consistently applied for more than a quarter of a century.

In reversing the decision of the Customs Court, the court below made its grounds clear. Thus, while recognizing the general doctrine that inland freight is not includible in the dutiable value of imported merchandise, the court below relied upon and adopted the reasoning of its prior decisions in the cases of *United States* v. *Heffernan Paper Co.*, 13 Ct. Cust. Appls. 593; *United States* v.

Traders Paper Co., 14 Ct. Cust. Appls. 293; and *United States* v. *Zellerbach Paper Co.*, 28 C.C.P.A. (Customs) 303. In those cases, an exception to the general inland freight rule was applied to merchandise the sales of which were made exclusively on an f.o.b.-destination basis, on the ground that the inland freight had lost its character as such because it had been incorporated in and had become an integral part of the unit price of the merchandise. On that reasoning, the court below held, as it did in the case at bar, that in such circumstances the general doctrine which excludes inland freight as such from the dutiable value of imported merchandise is not applicable.[3]

The issue involved is, therefore, one of rather narrow scope, which turns upon the particular, and frequently changing, form of the sale that takes place in the exporting country.[4] In the circumstances, and particularly in view of the peculiar

[3] Sections 2907 and 2908 of the Revised Statutes of the United States, which required that transportation charges be included in the dutiable value of imported merchandise, were repealed by the Act of March 3, 1883, 22 Stat. 488. After the repeal of those Sections, it was held that inland freight as such was no longer a part of the dutiable value of imported merchandise. See *Robertson* v. *Bradbury*, 132 U.S. 491, 496.

[4] It should be observed that the exception to the general doctrine which was applied by the court below applies only to cases where the merchandise is sold exclusively on an f.o.b. basis. It would not apply, of course, even to f.o.b. sales in cases where the merchandise is freely offered to all purchasers on an at-the-factory basis, because in those cases the freely offered price at the factory, *i.e.*, the principal market price, would govern, and the f.o.b. terms of the sales would be considered as having been agreed upon merely for the convenience of the parties.

expertise of the court below in the field of customs law,[5] the question presented is not one of such large public importance as to call for review by this Court.

2. Without endeavoring to distinguish the prior decisions of the court below in the *Heffernan, Traders Paper,* and *Zellerbach* cases, *supra,* petitioner asserts (Pet. p. 4) that since 1883 inland freight has never been included as part of the statutory definition of *export* value. If petitioner assumes that those cases are inapposite because they involved foreign value rather than export value the assumption is erroneous. Although those cases involved the statutory foreign value as defined in Section 402(c) of the Tariff Act of 1930, *supra,* p. 3, (or its substantially similar predecessor[6]) rather than the export value as defined in Section 402(d) of that Act, *supra,* pp. 3-4, the differences between the two statutory valuation bases do not affect the principle involved, since foreign value differs from export value only to the extent that the former provides for sales for home consumption in the exporting country while the latter is concerned with sales for export to the United States. That distinction, as the court below indicated, is obviously without materiality in determining whether inland freight is to be excluded

[5] Appeals from decisions of the United States Customs Court are heard exclusively by the Court of Customs and Patent Appeals (28 U.S.C. 2637), subject to review by this Court (28 U.S.C. 1256).

[6] Section 402(b) of the Tariff Act of 1922, 42 Stat. 949.

from the dutiable value of imported merchandise where it has become an integral part of the purchase price of such merchandise.

3. The decision of the court below does not contravene Section 402(d) of the Tariff Act of 1930, *supra,* pp. 3-4. The pertinent part of that subsection defines export value as the

> * * * market value or the price, * * * at which such * * * merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

In the instant case, the principal market in Germany for the imported merchandise was Selb (R. 8), which is in Bavaria, where it was sold to all purchasers only on an f.o.b. Bremen basis (R. 8). The price at which it was sold exclusively on that basis included the cost of all containers and coverings, etc., and was the only freely offered price in that market. Consequently, there was no other price which would meet the requirements of Section 402(d). The purchase price of the imported merchandise was, therefore, the price which Sec-

tion 402(d) contemplates shall be the export value. That subsection does not expressly exclude inland freight from the freely offered price, and there is nothing in its language or history from which it may be reasonably implied that inland freight which has lost its character as such by becoming an inherent part of the purchase price must be excluded from that price for duty purposes.[7] As the court below aptly pointed out in its prior decision in *United States* v. *Heffernan Paper Co.*, 13 Ct. Cust. Appls. 593, 596, "if inland freight be allowed [in such circumstances], the importer is given a dutiable value for his goods which is less than the price at which they can be bought, on the open market * * *. Such a result, manifestly, was not in the mind of Congress when it enacted subsection (b) of section 402."[8]

The computation of a fictitious market price by deducting from the f.o.b. port price all of the actual transportation expenses incurred by the seller incident to delivering the merchandise at ports would result in prices differing from shipment to shipment, depending upon the number of ports involved and their distance from the principal markets. The statute, however, envisages a uni-

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[7] None of the cases cited and relied upon by petitioner to support its contentions (Pet. pp. 4-5) involved imports which were purchased in a market limited to sales or offers to sell restricted exclusively to f.o.b. destination or port terms.

[8] The statutory reference in the quotation is to the foreign-value section of the Tariff Act of 1922, the predecessor to the 1930 Act.

form price at which the merchandise "is freely offered in the principal markets" of the exporting country. It "does not contemplate two prices or two market values." *United States* v. *Passavant*, 169 U. S. 16, 22; *United States* v. *M. Minkus*, 21 C.C.P.A. (Customs) 382-389; *United States* v. *Zellerbach Paper Co.*, 28 C.C.P.A. (Customs) 303, 307-308; *John A. Steer & Co.* v. *United States*, 30 Cust. Ct. 504, 508.

CONCLUSION

The decision of the court below is clearly correct, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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